sibly have been seen by decedent by changing her position; *Held,* In the absence of proof that decedent actually placed herself in position to see the witnesses sign, the will is void. *In re Beggans' Will* (1905), — N. J. —, 59 Atl. Rep. 874.

The decision is noticeable only in that it evinces a determination to follow the narrow and technical construction of that clause of the Statute of Frauds which requires wills to be subscribed by witnesses "in the presence of the testator"; which construction is supported, it must be admitted, by the overwhelming weight of authority, but which seems, in many cases, to defeat, rather than promote, the object of the statute. Thus, it is held that the tests of presence are vision and mental apprehension. JARMAN ON WILLS, *p. 87. It is not necessary, even under this rule, that the testator actually see the witnesses sign, but he must be in such position that he can, if he has his eyesight, see them sign if he so chooses. 29 AM. & ENG. ENC. OF LAW, 210; *Ambre* v. *Weishaar,* 74 Ill. 109; *Reynolds* v. *Reynolds,* 1 Spears (S. C.), 253, 40 Am. Dec. 599. The courts of three states, at least, have broken away from this construction, and have abandoned vision as an exclusive test of presence. *Sturdivant* v. *Birchett,* 10 Grat. (Va.) 67; *Riggs* v. *Riggs,* 135 Mass. 238; *Cook* v. *Winchester,* 81 Mich. 581. These cases announce the doctrine that where the testator is in hearing distance, is conscious of all that is taking place, and expressly signifies his approval, and where no fraud is practised, the subscription of the witnesses will be upheld as valid even though done outside the testator's line of vision. It would seem that the decision reached in these latter cases throws around the execution of the will all the safeguards provided by the generally accepted rule, and at the same time escapes the probability of defeating the intentions of testators by the too technical construction of a statute designed for their benefit. See an article by James Schouler, "In Presence of a Testator," 26 *American Law Review* 857.

WILLS—LOST WILL—EVIDENCE—REVIVAL OF FORMER WILL, BY DESTRUCTION OF LATER ONE.—Decedent, in 1888, made what is known as the "Rulo" will favorable to appellee. This was found by appellee, among worthless papers in an unlocked valise, after testator's death, and probate of it was upheld, although contested not only on the ground of the suspicious circumstances under which it was found but also that another will had been made. Evidence, by the attesting witnesses, that a will, called the "St. Louis" will—since lost, destroyed or suppressed,—was made in 1897, was introduced, but failed to overthrow the "Rulo" will because no revocatory clause could be proved. On petition for a new trial on the ground of newly-discovered evidence, *Held,* 1. That testimony of the attorney who drew the will as to the existence of a revocatory clause is sufficient to warrant a new trial; 2. Revocation of a will does not revive an earlier will, in the absence of evidence that such was the testator's intent. *Williams* v. *Miles* (1905), — Neb. —, 102 N. W. Rep. 482.

This interesting litigation involving property valued at more than $1,000,000 has now been before the Nebraska Supreme Court for the fourth time. 63 Neb. 859, 89 N. W. Rep. 451; 94 N. W. Rep. 705, 62 L. R. A. 383; 96 N. W. Rep. 151. The court seems clearly justified in holding that the positive testimony of the attorney who drew the "St. Louis" will that he can recall the

exact terms of the revocatory clause satisfies the rule that, in order to warrant a new trial, newly-discovered evidence "must be of so controlling a nature as to probably change the verdict." For a discussion of the principles involved in this case see 2 MICHIGAN LAW REVIEW 238, where it is noted on a former appeal.

WILLS—PRECATORY WORDS—SUFFICIENCY TO CREATE TRUSTS.—A clause in testator's will devised and bequeathed all his property to his wife, her heirs and assigns, absolutely. This was followed by the provision, "It is my wish and desire that my said wife shall pay the sum of three hundred dollars a year to my sister-in-law, Miss Nellie Post." *Held,* not to create a trust upon the estate which the intended beneficiary could enforce. *Post* v. *Moore* (1905), — N. Y. —, 73 N. E. Rep. 482.

This decision is an illustration of the reaction against the earlier tendency in favor of raising trusts for the purpose of carrying into effect the wish or desire of the testator expressed in merely precatory or recommendatory terms. The rule has been laid down that precatory words will create a trust, if the subject matter be certain, if the person intended as beneficiary be certain, and if the words are so used that upon the whole they ought to be construed as imperative. *Knox* v. *Knox,* 59 Wis. 172, 48 Am. Rep. 487 (and note to latter report); *Warner* v. *Bates,* 98 Mass. 274. It will be observed that in the principal case, and cases like it, the decision must be based squarely upon the application of the third essential, since the first two are clearly satisfied. The earlier cases went to great lengths in holding precatory words similar to those above to be imperative, and to create trusts binding the estate granted, some even showing a tendency to give this doctrine the weight of a rule of construction. *Harrison* v. *Harrison's Adm'x,* 2 Gratt. 1, 44 Am. Dec. 365 (the cases being collected in a note to the latter report). In later years a decided reaction against this tendency is apparent, and a disposition is manifested by the courts to give to such words only their usual or ordinary meaning, rather than to find in them an imperative intent, unless such an intent as clearly appears as though positive terms had been used. *Bryan* v. *Milby,* 6 Del. Ch. 208, 24 Atl. Rep. 333, 13 L. R. A. 563; *LeSage* v. *LeSage,* 52 W. Va. 323, 43 S. E. Rep. 137; 27 AM. & ENG. ENC. OF LAW, pp. 38-45. It may be questioned whether this reaction has not already carried the courts of some of the states too far. It seems, at least, that the decision in the principal case cannot be reconciled with such comparatively recent and well-considered cases as *Foster* v. *Willson,* 68 N. H. 241, 38 Atl. Rep. 1003, 73 Am. St. Rep. 581; *Murphy* v. *Carlin,* 113 Mo. 112, 20 S. W. Rep. 786, 35 Am. St. Rep. 699; *Blanchard* v. *Chapman,* 22 Ill. App. 341; *Colton* v. *Colton,* 127 U. S. 300.